

Children, Gender and the Constitution: Rethinking Fundamental Rights for an Inclusive Future

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doi.org/10.64643/IJRTV12I6-191369-459

The Constitution of India envisions a society founded on equality, dignity, and justice for all citizens, irrespective of gender or age. Yet, women and children have historically faced marginalization due to entrenched patriarchal norms and socio-economic disparities.

In ancient India, particularly during the Vedic period, women enjoyed educational and social freedoms. Over the centuries, however, successive invasions, rigid caste hierarchies, and patriarchal traditions eroded their status, leading to systemic oppression manifested through practices such as child marriage, purdah, dowry, and female infanticide.

The Indian Constitution upholds equality before the law, prohibits discrimination based on sex, and empowers the State to make special provisions for women and children³⁷. It further guarantees equality of opportunity in public employment, mandates equal pay for equal work, and ensures humane working conditions and maternity relief³⁸. Despite these progressive safeguards, gender inequality and child vulnerability persist revealing a persistent gap between constitutional ideals and social realities.

Contemporary India has witnessed notable progress through legal reforms, social movements, and the increasing participation of women in education and governance. Yet, greater efforts are required to strengthen enforcement mechanisms, enhance awareness, and integrate gender sensitivity into all spheres of policymaking.

Keywords: Gender sensitivity, Patriarchy, Socio-economic disparities, Legal frameworks, Historical context.

I. INTRODUCTION

The idea of universal rights is the foundation of modern constitutionalism. Yet, throughout history, the concept of universality has been based on assumptions that are male-centric, cisgender, and

adult-oriented. It has also been limiting and exclusive. The rights-bearing individual was traditionally envisioned as an adult male citizen in most constitutional traditions, disregarding the unique vulnerabilities of children and gender-diverse persons. When children's rights were considered, they were usually in the context of charity programs, not basic human rights. Gender expression, bodily liberty, and gender identity were also under-recognized. Following the 1989 passage of the Convention on the Rights of the Child (CRC), which reimagined children as autonomous right-holders¹, this worldview has been transformed by international human rights law. But these ideas' constitutional adoption varies from one jurisdiction to the next. Transgender, non-binary, and gender nonconforming teenagers, as well as other gender-diverse youngsters, continue to endure unequal treatment in terms of abuse, social exclusion, and legal status. Thus, a major obstacle confronts constitutional law: how to account for children's developing abilities while also taking into account contemporary views of gender and identity. The purpose of this study is to investigate potential new avenues for safeguarding children of different gender identities through rethinking constitutional design and judicial interpretation. Fundamental rights jurisprudence, according to this future-oriented constitutional vision, must be based on concepts that are intersectional, inclusive of gender, and child-centric.

II. CONCEPTUAL FRAMEWORK: CHILDHOOD, GENDER AND CONSTITUTIONALISM

A person's "childhood" is defined by their social and legal contexts, rather than by their biological or chronological age. The law has traditionally taken a

¹ *Convention on the Rights of the child, 1989*

protective stance toward children, seeing them mainly through the prism of their vulnerability and lack of maturity. Because of these presumptions, children were viewed more as objects to be protected than as human beings with inherent rights. Recognizing that children's autonomy grows gradually, the CRC proposed the principle of "evolving capacities"². But many constitutional systems aren't up to speed yet, so the opinions of youngsters are marginalized in court and in policymaking. Biological sex was initially considered as a binary concept in most constitutions. In modern theories of gender, there is a clear demarcation between biological sex and the more subjective and socially produced concepts of gender identity and expression. Although this more expansive view is not necessarily found in

Constitutional text, it has been popular in human rights discussions. The lack of specific language on gender expression or identification in most constitutional equality provisions leaves transgender and gender-diverse youngsters vulnerable to erasure. The extent to which courts can fill up gaps through interpretation differs greatly throughout jurisdictions³. The intersectionality theory put forth by Crenshaw shows how different types of identities create new kinds of vulnerability. When factors such as caste, disability, indigeness, gender identity, and age interact, transgender girls from marginalized communities, disabled non-binary children, and Indigenous transgender boys may experience intensified forms of prejudice. However, many legal systems' frameworks view discrimination as a sole category.

III. CONSTITUTIONAL TREATMENT OF CHILDREN: PROTECTION, AUTONOMY AND PARTICIPATION

Historically, constitutions have included provisions meant to safeguard children, such as requiring the state to ensure they have access to adequate food, education, and medical treatment. Despite its necessity, this paradigm frequently puts children's independence and choice in the background. The

courts have expanded these safeguards to encompass the right to health, which is especially important for mothers and infants⁴. While the "best interests of the child" notion is fundamental, it has been utilized to limit children's involvement in decisions concerning gender transition, sexuality, or identification on occasion. In line with Article 12 of the CRC, the participation paradigm acknowledges that children have the capacity to develop and articulate opinions. Participatory rights are specifically outlined in the constitutions of several countries, like Kenya and South Africa. Decisions about children's identities and education can be significantly influenced by their voices, according to the case law of these jurisdictions. Following the Supreme Court's affirmation of privacy as a basic right in *K.S. Puttaswamy*⁵, the judiciary in India has recognized children's decisional autonomy and privacy. Autonomy and protection must be balanced in a strong constitutional model. Children are infantilized by total protectionism, and those who have too much freedom are vulnerable to exploitation or compulsion. A method that takes into account evolving capacities provides a more nuanced framework.

Gender Diversity and the constitution: Key Challenges
For transgender youngsters, the most divisive topic is the need for legal recognition of their gender. Alterations to one's gender identification are often not legal until one reaches maturity, and even then they often necessitate the approval of parents, a mental diagnosis, or medical interventions. Dignity, autonomy, and identity are all violated by these requirements. A child's identity is greatly influenced by their school. Bullying and pressure to conform can occur there, especially for children who identify as non-binary. Equality, dignity, and a safe learning environment are fundamental constitutional rights, and inclusive schools provide just that. It is the responsibility of the state to provide accessible and safe education, according to the Supreme Court. Teens' access to counseling, hormone therapy, and puberty blockers is still up for discussion. But there is

² *Convention on the Rights of the child, Art.5*

³ *UNICEF, The Right of Transgender Children to Recognition, Identity and Autonomy (2021)*

⁴ *Laxmi Mandal v Deen Dayal Harinagar Hospital, 2010 SCC OnLine Del 2230*

⁵ *Justice K.S. Puttaswamy (Retd.) v Union of India, (2017) 10 SCC 1*

widespread agreement among doctors that gender-affirming healthcare is crucial. Protecting the autonomy of the body and the right to make one's own decisions are central to Indian privacy law, particularly *Puttaswamy*. Gender identification is a common source of contention between parents and children. When deciding cases, comparative courts have put the comfort of children ahead of that of their parents. Just as the "best interests" criteria cannot allow outside prejudices to compromise children's autonomy, so too does Indian law. The rights of parents over their children are frequently guaranteed by the constitution. Disagreements emerge when a child's gender identity is at odds with parental choices. Parental wishes cannot supersede the inherent worth and individuality of a child, according to courts in countries like Brazil and Colombia.

Reinterpreting Fundamental Rights through a Child-and Gender-Inclusive Lens

The Constitution must specifically protect individuals based on their age, gender identity, and how they express their gender. Recognizing intersectional discrimination is equally important. An example of how constitutional equality can break down long-standing structural inequality is seen in South African case law. Inherent in dignity are acknowledgment, individuality, and personhood. Disregarding a child because of who they are as a person is terrible. When it comes to hospitals and schools, privacy law is starting to acknowledge kids' autonomy and their right to privacy. Looking at the Constitution from Different Angles. There are strong safeguards for children and people who identify as gender non-conforming in South Africa's revolutionary constitution. Gender identification is now included in equality guarantees, and recent case law has expanded these protections to include school settings. The importance of gender identity to personal freedom and respect has been upheld in several landmark Indian court decisions, such as *NALSA v. Union of India* and *Navtej Singh Johar v. Union of India*⁶. Legal protections for transgender children are still lacking.

Child and gender-diverse person rights are particularly strong in South Africa's new constitution.

Gender identification is recognized as part of the equality guarantees in recent jurisprudence, which expands these protections to include school environments. Legal precedent in India, such as *NALSA v. Union of India* and *Navtej Singh Johar v. Union of India*, upholds the importance of a person's gender identification to their freedom and respect. Nevertheless, transgender children still lack full constitutional and statutory recognition.

Constitutionalizing Gender Identity and Gender expression

Gender expression and gender identity must be explicitly addressed in equality clauses in any progressive constitutional design. Gender identity is an essential part of individual autonomy and dignity, according to the Indian Supreme Court's rulings in the cases of *NALSA* and *Navtej Singh Johar*. Nevertheless, there is no mention of this in the Constitution. Judicial interpretation and normative assurances could be reconciled through explicit enumeration. Legal invisibility is prevented for children through such identification. Also, it establishes a constitutional standard that all institutions, including healthcare facilities, schools, and juvenile justice systems, must work to eliminate discrimination against people because of their gender identity or expression. It is imperative that constitutions declare gender diversity to be a valid and safeguarded aspect of human identity, rather than an aberration. There has been a partial incorporation of the CRC's notion of developing capacities into constitutional law. Without acknowledging the fluctuating growth of adolescents, courts frequently embrace static and binary concepts of childhood, such as infantile or independent. Legal recognition of gender identity should not be contingent on strict age thresholds; children should be able to exercise their rights in line with their maturity; minors should not be subject to blanket prohibitions on gender-affirming care or self-identification; and children should be required to participate in all decisions that impact their identity. This would all be outlined by an evolving capacities doctrine that is embedded in the constitution

⁶ *Navtej Singh Johar v Union of India*, (2018) 10 SCC 1; *NALSA* (2014).

Dignity – Centered Adjudication for Gender- Diverse Children

Dignity connects individual identity with constitutional morality. Children, particularly those who do not identify with a binary gender, experience dignity firsthand when they are acknowledged, respected, and validated. A dignity-centered approach to justice would include the following: • Viewing gender-affirming healthcare as linked to physical and mental health; • Recognizing that non-recognition of identity in schools or official documents constitutes constitutional harm; • Treating forced conformity, denial of expression, and misgendering as violations of dignity. Similar lines of thinking are beginning to emerge in India following the decisions of Puttaswamy and Johar, following the lead of South African jurisprudence that shows how dignity may drive structural development. This trend has to be reinforced with focused, kid-friendly interpretation.

Child-Centered Equality and Intersectionality

The complexity of identity-based oppression must be recognized in order to achieve children's equality. According to Crenshaw's idea of intersectionality, a person's vulnerabilities are compounded when age, gender, caste, disability, religion, indigenous status, and poverty all interact with one another. Hence, a constitutional framework should identify intersectional discrimination as a separate category; broaden the scope of rights afforded by Article 15 to encompass intersections based on age, gender, expression, and caste when it comes to gender embrace real equality, declaring that the state must do more than just prohibit discrimination; it must also eliminate systemic obstacles. State action must be "gender-just" and future-oriented, not paternalistic, according to Indian jurisprudence in *Anuj Garg*⁷, which provides a model for such substantive equality.

Procedural Rights: Voice, Representation and Participation

Procedural safeguards that allow children, particularly those who identify as gender nonconforming, to effectively exercise their rights are essential for the

effective protection of the constitution. The following are covered: Mechanisms for child-friendly complaints autonomous counsel in cases involving questions of personhood, health, or academic entitlement required parental involvement prior to making decisions that might impact a child's gender identification Security measures to avoid disclosure or abuse, expanding upon privacy law and the Gillick case. Active citizenship is essential to the legitimacy of democracy and the morals enshrined in the Constitution; it is not an afterthought.

Constitutional Morality and Transformative Justice

Constitutions that aim to transform society, such as those in India and South Africa, restructure power dynamics within society instead of just limiting the power of the state. To interpret basic rights in light of equality, dignity, autonomy, and fraternity; to reject social prejudices against gender-diverse children; and to be vigilant against majoritarian standards that enforce binary gender, constitutional morality becomes a guiding principle. According to India's Johar ruling, constitutional morality takes precedence above societal morality. Taking this line of thinking and applying it to kids prevents them from letting cultural discomfort make them feel like they don't belong.

IV. CONCLUSION

A cornerstone of contemporary constitutionalism is the acknowledgment of children, and especially children who identify as gender non-conforming, as persons with inherent rights. The greatest principles of fairness and equality are reflected in a constitution that safeguards the independence, respect, and individuality of its most defenseless citizens. Therefore, in order to fulfill the promise of human rights for every child, constitutional reinterpretation and reform must progress toward frameworks that are inclusive, intersectional, and focused on the child. It is not enough to just find ways to include children and gender minorities inside current systems; we must also reevaluate those systems from the ground up. Since much of modern constitutionalism rests on cis-

⁷ *Anuj Garg v Hotel Association of India*, (2008) 3 SCC 1.

heteronormative, adult-centric assumptions, we need to rethink and reinterpret the principles of equality, liberty, privacy, and dignity in light of the social reality faced by children whose identities do not fit neatly into either of these categories. To achieve this goal, the field of constitutional law must acknowledge children as full participants in constitutional discussions, rather than demeaning them or ignoring their developing abilities. Through rights-based legislation, progressive jurisprudence, institutional change, and social transformation, we must persevere on the constitutional path toward a more inclusive future. It is within reach, nevertheless, to establish a constitutional system that does more than just safeguard children; it empowers them, acknowledges and celebrates gender variety, and strives for fairness while making it a reality in children's daily lives. By rethinking constitutional rights from a gender-inclusive and child-centered perspective, states may fulfill their greatest constitutional obligations and guarantee that every child has the freedom to exist, develop, and find their place in the world.

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